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WM. R. STANLEY

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In the Supreme Court of the United States

OCTOBER TERM, 1924.

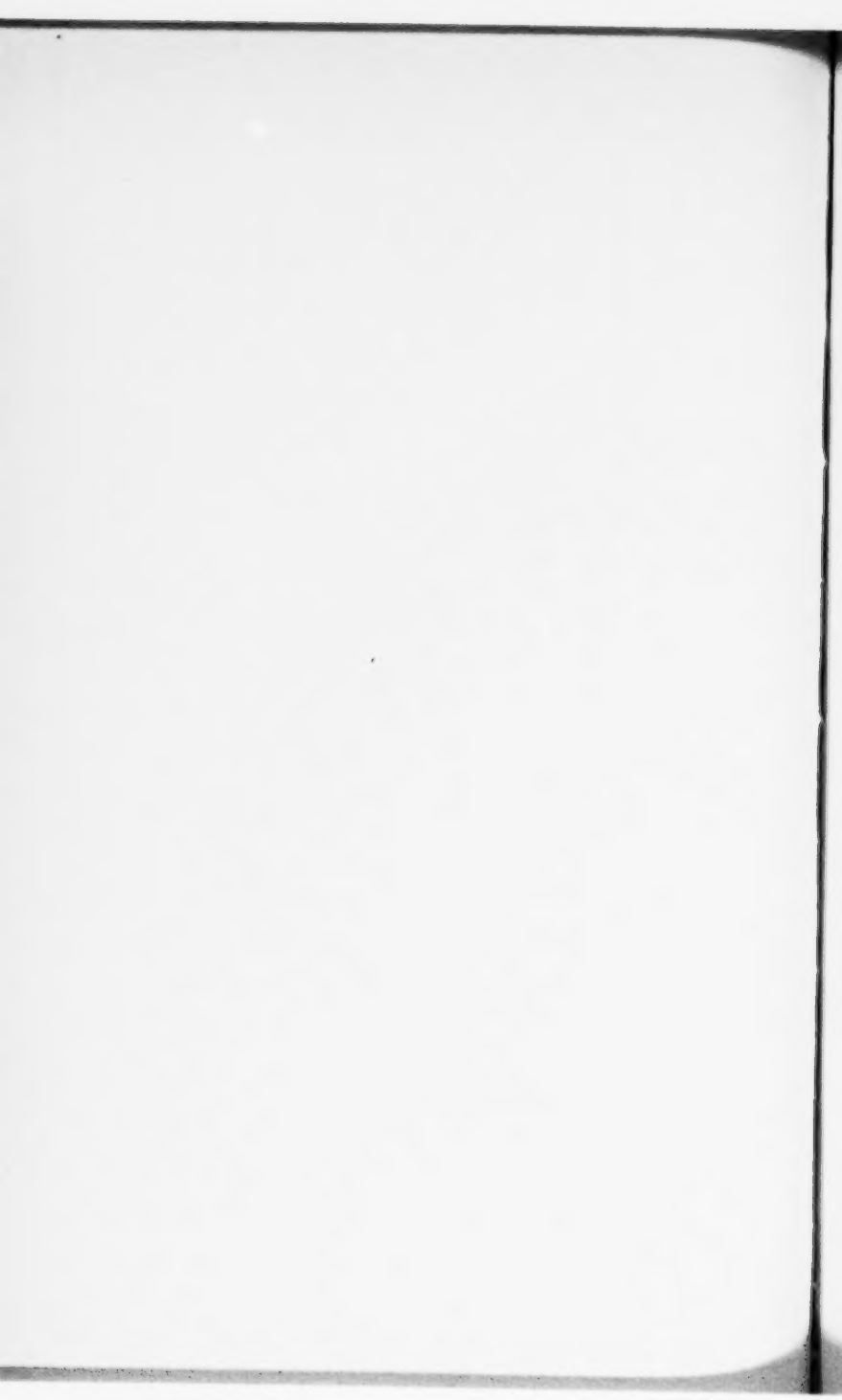
THOMAS AGNELLO, *et al.*, *Petitioners*,

v.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR REHEARING.



INDEX.

	PAGE
Notice	1
Petition of Thomas Agnello and James Pace for Rehearing	2
Memorandum on Behalf of Petition of Thomas Agnello and James Pace for a Rehearing.....	10

I.

The opinion of the Circuit Court of Appeals states:

“Following this, several of the officers went to No. 167 Columbia Street, Brooklyn, which was occupied as a grocery store and also as a residence by the Agnellos” (p. 522).

II.

The Assistant District Attorney stated in his summation that the can was found in the home of the Agnello boys. This statement was stricken out by the Court (p. 504), but must be taken as an indication that the prosecution believed it has established this fact against both of the Agnellos.

III.

The testimony with reference to the connection of petitioners with the store and residence at 167 Columbia Street is as follows:

Manning, Inspector in the Narcotic Squad, testified that he followed Centorino to 167 Columbia Street just before the sale, and that Centorino first went to 172 Columbia Street, that “He came down and crossed the street and went down to No. 167 Columbia Street, which seemed to be like a grocery store” (p. 73). After about ten minutes Sentorino came out with Pace “and the two Agnello boys” (p. 74).

Manning further testified that after the sale had been made, and after the arrest, he went to 167 Columbia Street. He was then questioned as follows:

"Q. What part of the premises did you go to there?

"A. The store and the back rooms and in the yard.

"Q. What kind of a store is it?

"A. An Italian grocery store.

"Q. Is that the same store that you had seen Centorino, Pace and the Agnello brothers leave shortly before?

"A. It is" (pp. 83-84).

* * * * *

"Q. Now, you did go to this grocery store and came out?

"A. I did" (p. 85).

IV.

Petitioner submits that he presents to the Court exactly the same construction of the record that was presented to the trial court by the Assistant District Attorney. For, solely upon the foregoing evidence, an effort was made to introduce evidence of the search and of the seizure of the can of cocaine. Objection was made to this evidence, and the following colloquy, within the hearing of the jury, ensued:

"Mr. Brancato: The place they went to search, that is, the grocery store, is a place where the defendants were seen coming out of but a short while before, probably half an hour before, the four of them, and from that place they went to the place at number 138 Union Street.

* * * * *

"Mr. Brancato: It was the defendant's place of business; that is, the place of business of Pace, who was a partner with—

* * * * *

"Mr. Brancato: I will prove that" (p. 85).

V.

Ralph Oyler, the agent in charge of the Narcotic Squad, testified, to the like effect as Manning, that he saw Centorino, before the sale was consummated, go to the store at 167 Columbia Street; he did not see what Centorino was doing inside the store, but he saw that he talked to somebody in the front "and then went on in the back" (p. 126). After ten or fifteen minutes Centorino came out with Thomas Agnello, Frank Agnello and Pace. Oyler testified that after the arrest he questioned Pace and Thomas Agnello. He asked Pace where his place of business was, and Pace answered, "No. 167 Columbia Street" (p. 133). Thomas Agnello then came over. Oyler then testified as follows:

"He came over with Pace. He said he and Pace were partners. I asked Pace if that was right and he said 'Yes'. I then asked them where they lived, again, and they said at 167. I informed him that we were going to search that house, they said, 'All right' " (p. 135).

VI.

Moog, another narcotic agent, testified that "Centorino went to 167 Columbia Street again; that is the grocery store, and he entered there and stayed about ten minutes and then came out with the Agnello brothers" (p. 191).

VII.

The foregoing states all the evidence that was offered on direct on the part of the prosecution. The professed pur-

pose on the part of the prosecution was to show that Thomas Agnello was a partner of Pace in the conduct of the grocery store at 167 Columbia Street, that Centorino entered the grocery store, went in back of the grocery store, and came out with Pace and the Agnello brothers; that this furnished warrant for a search of the entire premises at 167 Columbia Street, since it justified the belief that the cocaine, which was the subject of the sale, had been obtained either from the store, or the premises in back of the store, at 167 Columbia Street.

It was the contention of the prosecution that the record indisputably showed that Petitioners were bound by any evidence that was obtained from any part of the premises at 167 Columbia Street.

VIII.

On cross-examination of Mary Centorino, wife of the defendant Centorino, a witness for the defense, she testified that the Agnello brothers lived in the grocery store at 167 Columbia Street:

“Q. Who lives in the grocery store?

A. The two other fellows.

Q. The Agnello brothers?

A. Yes, sir.

Q. They live in the grocery store, in the back of the grocery store?

A. Yes, sir.

Q. Is that right?

A. Yes, sir” (p. 311).

IX.

Montaperto, a wholesale grocer, a witness on behalf of the defendant, testified on cross-examination that the Ag-

nellos conducted the grocery store at 167 Columbia Street. It is not made clear however whether this is intended to refer to Thomas Agnello (p. 378).

X.

Centorino, one of the defendants, testified on direct that he went to Agnello's grocery store at 167 Columbia Street, where he met and spoke to Frank Agnello (p. 398). After he left the store, and while he was standing in front of the door, Thomas Agnello and Pace came out (p. 401). On cross-examination he testified that he went to 167 Columbia Street, "the grocery store where the Agnello boys live" (p. 426), that he did not go in the room back of the store, that he did not see Pace or Thomas Agnello, but that they came out of the grocery store immediately after he left the store (p. 428).

The witness Tarodaro testified that she was never in the living rooms back of the store, but that she understood that the mother of Agnello occupied one of the two rooms (p. 468).

XI.

Frank Agnello testified that he sleeps back of the store, that Tom did not sleep back of the store but lived on Strong Place, that his family consisted of his father and mother, his brother Tom, his sister and himself, that all lived at 167 Columbia Street except Tom (p. 478).

XII.

Petitioners present that there is not a scintilla of evidence in the record to controvert the fact that they con-

ducted the grocery store at 167 Columbia Street, that this store communicated with the rooms in the rear, and that the living rooms and the store were part of one establishment.

XIII.

Petitioners present that the search of the premises at 167 Columbia Street started with a search of the grocery store, that the facts which, according to the officers, led to the search were that Thomas Agnello, Frank Agnello and Pace were seen to leave the grocery store, in company with Centorino, that the search of the living rooms in the rear was part of a continuous act, and was part of the same search.

WHEREFORE, petitioners pray that the Court may grant a rehearing of this case, and that pending such rehearing the issuance of the mandate of this Court be stayed.

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CERTIFICATE OF COUNSEL.

I, GEORGE GORDON BATTLE, of counsel to Thomas Agnello and James Pace, the petitioners herein, do certify that this petition is presented in good faith and not for delay.

GEORGE GORDON BATTLE.

boys. The statement that it was "found in their home" was held by the Court to be unfounded. But there was no ruling by the Court on the question of fact, as to whether Thomas Agnello and Pace conducted the grocery store, which connected with the living rooms in the rear. Whether the prosecuting attorney made reference to this fact in his summation does not appear. But so much emphasis had been based upon this fact in the course of the trial, that it must be presumed that the jury accepted the testimony to the effect that Thomas Agnello and Pace did own and conduct the grocery store.

V.

The can of cocaine was received in evidence against all the defendants. This was the deliberate ruling of the Court. The Court allowed "an exception to each of the defendants" (p. 491). Later the Court admitted the evidence as to Centorino, only on the second count (p. 491). Objection was made on behalf of all of the defendants to any evidence of the contents of the can, and exception duly taken (p. 494). The can was then received in evidence as against all of the defendants (p. 496). The only limitation placed by the Court upon its reception in evidence was that it was received "as against Centorino and Alba only on the second count" (p. 496). Inasmuch as the second count was dismissed, the can of cocaine and the evidence of its contents remained in the case as evidence against Pace, Frank Agnello and Thomas Agnello.

VI.

It only remains to consider the effect of the statement of the Court in the colloquy between counsel that arose

during the summation of the prosecuting attorney. When objection was made by the attorney for Frank Agnello and Alba to any reference to the can of cocaine on the ground that the second count had been dismissed, the Court stated that "It is only admissible against Frank Agnello, his own home" but overruled the objection based on the ground stated by this attorney (p. 503). If this Court finds that the officers had no right to search a floor of the building which consisted of a single establishment, part of which was occupied by Thomas Agnello and Pace, for the reason that such search constituted a violation of his Constitutional rights, then we submit that the effect of this search should not be minimized because of a statement made by the Court in the course of colloquy, which was at variance with the deliberate ruling of the Court. This statement was not part of the charge. It is to be read in the light of all the circumstances. The suggestion that the matter should have been covered by a specific request to charge, we submit, has no application to a case where the Court has immediately before its charge directly and definitely ruled upon the proposition, after a complete presentation of the arguments and statement of the objections to the evidence. In any case whatsoever which involves these important Constitutional rights, it is dangerous to sacrifice the substance of these rights to the possibility that the jury may have heard and understood the statement of the Court, made in colloquy, followed immediately by a ruling of the Court which sustained the District Attorney, and overweighed as it was by the ruling of the Court which admitted the evidence over the repeated objection of all the defendants. The fact that it was then argued that the can was found in the home of the Agnello boys, and that this

statement was corrected by the Court, did not overcome the unquestioned and unquestionable fact that Thomas Agnello and Pace did operate and conduct the grocery store. Upon all the rulings of the Court the jury consistently could have found that, while Thomas Agnello did not live in the rooms in the rear of the store, he did conduct the grocery store which controlled the access to the rear rooms, and in view of the fact that Frank Agnello denied any knowledge that would explain the finding of the can of cocaine in his bedroom, the jury might well have found that that furnished additional evidence for imputing responsibility for the can of cocaine to Thomas Agnello.

VII.

The search of the bedroom occupied by Frank Agnello was a violation of the Constitutional rights of Thomas Agnello and of James Pace. The right to search a store, or a home, or an apartment, should not be made to depend upon the fact that the particular room searched was not immediately occupied by the person against whom the evidence is offered. In this case we submit that no search could have been made of the cellar, nor of the yard around the building; nor could a search of the bedroom occupied by the mother and father be made so as to obtain evidence against Frank Agnello, who occupied the adjoining bedroom. Every reason that has ever been urged in support of the Constitutional right of a person to be secure and

safe in his home and in his establishment is against making such fine distinctions.

It is respectfully submitted that a re-hearing should be granted to Thomas Agnello and James Pace, and that upon such re-hearing, the judgment of the Circuit Court of Appeals as to Thomas Agnello and James Pace should be reversed.

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In the Supreme Court of the United States.

OCTOBER TERM, 1922.

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THE UNITED STATES, RESPONDENT. } No. —.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

CONCURRENCE BY UNITED STATES IN ISSUANCE OF WRIT.

STATEMENT.

The United States deeming the question of search and seizure decided below to be one of general public importance, and one that should be authoritatively decided by this Court to the end that there may be uniformity of action on the part of Government officers in the enforcement of the so-called anti-narcotic statute throughout the country, hereby joins with petitioners in requesting that the writ of certiorari issue as prayed for.

JAMES M. BECK,
Solicitor General.

APRIL, 1923.